

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 November 2022

Public Authority: Norwich City Council

Address: DPO@norwich.gov.uk

Decision (including any steps ordered)

1. The complainant requested a range of geographic information system (GIS) information. Norwich City Council (the "council") refused to provide the information citing the exceptions for commercial confidentiality (regulation 12(5)(e)) and intellectual property (regulation 12(5)(c)).
2. The Commissioner's decision is that the council was entitled to rely on regulation 12(5)(e) to refuse the request.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 2 March 2022, the complainant made the following request for information to Norwich City Council (the "council"):

"Please provide the following GIS datasets:

From Green Spaces:

Allotments

Local nature reserves

maintenance boundary

Mousehold tree inspection routes

Parks

Parks Open Spaces play

Play areas

Tree Groups

Trees

From Contract Services:

Grounds maintenance contract data

Grounds maintenance areas volunteer maintained

To preempt concerns around commercial interests I have no interest in costs.

Please provide the data as GIS data

please include explanations for fields that are not obvious

please state the projection system used in mapping

I am also applying for a license (OGL 3) for reuse."

5. The council's final position is that all the requested information is subject to the exceptions in regulation 12(5)(c) and 12(5)(e) of the EIR.

Reasons for decision

Re-use of Public Sector Information Regulations 2015 (RPSI)

6. The complainant has stated that he intended the council to handle his request under the RPSI.
7. The RPSI applies to information produced by a public sector body as part of its public task, i.e., its core role and function. This is called public sector information. The RPSI is about permitting re-use of this type of information for a purpose other than the one it was originally created for, and how the information is made available. For example, the

Commissioner's annual reports are information produced as part of his public role as a regulator; they constitute public sector information and the RPSI applies to them. This information is made available under the terms of Open Government licence¹.

8. For a public sector body to be able to make public sector information available for re-use, the public sector body must also be the holder of the intellectual property rights ('IPR') for the requested information. That is, RPSI does not apply to recorded information that a public sector body does hold but of which it is not also the IPRs holder.
9. RPSI is not about accessing the information but about permitting its re-use. Normally, the RPSI would also not apply to information which is exempt under the EIR. This is because – if the information enjoys exempt status – it cannot be made available and consequently re-use is also not permitted.
10. In this case the council has confirmed that the IPR holder for the requested information is Ordnance Survey (OS). It follows that RPSI does not apply in this case and that the council is not obliged to make the information available for re-use.
11. The Commissioner has gone on to consider whether the council correctly applied regulation 12(5)(e) to withhold the information under the EIR

Regulation 12(5)(e) – commercial confidentiality

12. Information can be withheld under regulation 12(5)(e) of the EIR if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
13. The council has stated that the GIS data requested, which is created by the council, is intrinsically linked to the maps on which it is built / presented because they refer to mapping references that would not otherwise be available. The council has argued that the map used is the creation and property of OS and it uses OS maps under licence with OS. The council confirmed that the licence in place recognises that the map

¹ <https://ico.org.uk/about-the-ico/our-information/annual-reports/>

is confidential data that should not be released by licensees except in specific circumstances.

14. The council has further argued that to release the GIS data created by the council would have a negative commercial impact on OS. It explained that OS is a commercial entity that creates and markets assets and the OS licensing model allows for the release of their assets in circumstances where an end user signs an agreement with the licensee that stipulates the terms of use for the requested data.
15. The Commissioner notes that the effect of signing such an agreement would be to place restrictions on the re-use of any information disclosed. This is something which the complainant was seeking to avoid by requesting the information under the RPSI.
16. The council confirmed that it advised the complainant of this process but the complainant declined to sign the end user licence in question. The council has stated that, without licensing terms being agreed to, the OS asset would be available for re-use in the public domain without constraints to protect OS's commercial activity. Therefore, the council has argued, individuals and organisations would be able to use OS assets without paying OS which would result in a loss of income to OS through their licensing model.
17. Having considered the council's submissions the Commissioner is satisfied that the OS is the IPR holder for the models upon which the requested information has been created. He considers that the restrictions imposed by the End User Licence Agreement represent a limitation which is equivalent to a confidentiality agreement. It follows that disclosing the information with no restrictions on re-use, would breach this confidentiality and result in adverse affects to OS' commercial interests which the confidentiality is designed to protect. This means that the Commissioner finds that the exception provided by regulation 12(5)(e) of the EIR is engaged.
18. As he has concluded that the exception is engaged the Commissioner has gone on to consider the public interest test.
19. In relation to the public interest in disclosure the council has confirmed that it always takes the stance to favour the release of information and seeks to apply exceptions only when required.
20. The council has acknowledged that releasing the requested information would help it to comply with its transparency and accountability agenda.

21. In relation to the public interest in maintaining the exception, the council has argued that releasing information which the OS makes available as a commercial enterprise, and disclosing it outside the licensing agreement which places restrictions on its re-use, would clearly result in harm to the OS' commercial interests.
22. The council has also argued that, whilst the principle reason for withholding the information was to protect OS' interests, disclosure would also require the council to breach its contract with the OS. The council has noted that this would be likely to result in the OS revoking the council's licensing or refusing to renew it in future. It has argued that this would have a huge impact on the council's ability to map geospatial information which in turn would reduce its ability to deliver frontline services or identify potential efficiency savings for the public.
23. Finally, the council has highlighted that it has identified an alternative, reasonable route for the complainant to access the information, namely by them signing the OS End User Licence Agreement. The council considers that this satisfies the public interest in transparency and accountability as the complainant would have access to the information albeit with restrictions on re-use imposed.
24. Having considered the relevant public interest arguments, the Commissioner can find no specific factors in favour of disclosure which would counterweigh the public interest in protecting the commercial confidentiality identified in this case. Whilst he recognises why the complainant is seeking the information he is satisfied that, on the facts of this case, the council is entitled to withhold the information under regulation 12(5)(e) and that the public interest favours maintaining the exception.
25. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).
26. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation

12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

27. In light of this decision, he has not gone on to consider the council's application of regulation 12(5)(c).

Right of appeal

28. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Christopher Williams
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